IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

Civil Action No. 1:18-cv-02711 (DLF)

DEFENDANTS' MEMORANDUM IN SUPPORT
OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

U.S. CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION

The E-Government Act of 2002 requires that Federal agencies publish a Privacy Impact Assessment ("PIA"), if practicable, before "initiating a new collection of information." Plaintiff, the Electronic Privacy Information Center ("Plaintiff") seeks an injunction against the Department of Commerce and the Census Bureau ("Defendants") prohibiting them from taking further steps to implement a citizenship question on the 2020 Decennial Census until such time as they complete and make publicly available a PIA that specifically addresses the collection of citizenship information for each information technology system involved in the collecting and processing of respondent information. Plaintiff argues that the Census Bureau was required to publish a PIA addressing the inclusion of a citizenship question on the 2020 Decennial Census questionnaire as of March 26, 2018, the date that the Secretary of Commerce announced his decision to include that question on the 2020 Decennial Census.

To begin, Plaintiff lacks standing. The inclusion of a citizenship question on the 2020 Decennial Census inflicts no cognizable harm on Plaintiff or its "members" (to the extent that individuals on Plaintiff's advisory board qualify as members), and neither Plaintiff nor its "members" have a sufficient informational interest in compelling publication of an updated PIA specifically addressing the collection of citizenship data now, as opposed to later. That is particularly true because the relevant provision of the E-Government Act protects individuals "by requiring an agency to fully consider their privacy before collecting their personal information," *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017), not by creating a broad public right to information. Nor, as this Court has already noted, would an injunction enjoining the Census Bureau from including the citizenship question on the 2020 Decennial Census redress the alleged informational injury. Mem. Op., *Elec. Privacy*

Info. Ctr. v. U.S. Dep't of Commerce, __ F. Supp. 3d __, 2019 WL 498520, at *9 (D.D.C. Feb. 8, 2019), appeal filed, No. 19-5031 (D.C. Cir. Feb. 21, 2019).

Furthermore, as this Court has already correctly determined – Plaintiff's claims fail on the merits. *See id.* at *8. Plaintiff's lawsuit is premature because the Census Bureau's obligation to complete, and if practicable, publish an updated PIA specifically addressing the inclusion of a citizenship question on the 2020 Decennial Census has not yet ripened. The obligation to complete and publish, if practicable, a PIA attaches only once the agency "initiat[es] a new collection of information." E-Government Act, Pub. L. 107-347, 116 Stat. 2899 (2002), § 208(b)(1)(A)(ii). As this Court held, this phrase "initiating a new collection of information," means "to require at least one instance of 'obtaining, causing to be obtained, soliciting, or requiring the disclosure . . . of facts or opinions." Mem. Op. at 17, 2019 WL 498520, at *8 (quoting 44 U.S.C. § 3502(3)(A)). "This interpretation is fatal to the plaintiff's [Administrative Procedure Act ("APA")] claims. [Defendants] did not act contrary to the E-Government Act by deciding to collect citizenship data before conducting, reviewing, or releasing a PIA specifically addressing the decision to reinstate a citizenship question on the 2020 Decennial Census. *See* 5 U.S.C. § 706(2). Nor have the Defendants 'unlawfully withheld' agency action by declining to modify their existing PIA earlier required by the statute. *See id.* § 706(1)." *Id.* Accordingly, and following its earlier, correct, reasoning, this Court should dismiss Plaintiff's Complaint in its entirety.

BACKGROUND

I. STATUTORY BACKGROUND.

The E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (2002), *codified at* 44 U.S.C. § 3501 note (hereinafter "E-Government Act" or "E-Gov. Act"), requires Federal agencies to have performed and, if practicable, publish a Privacy Impact Assessment ("PIA") when

"developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form," or, consistent with the Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq.*, when "initiating a new collection of information" that "will be collected, maintained, or disseminated using information technology" and "includes any information in an identifiable form permitting the physical or online contacting of a specific individual." E-Gov. Act § 208(b)(1)(A)(i), (ii); *see also* Office of Management and Budget, Memorandum M-03-22, OMB Guidance for Implementing the Privacy Provisions of the E-Government Act. "The purpose of this [requirement] is to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government." E-Gov. Act, § 208(a).

Among other things, the PIA is to address "what information is to be collected," "why the information is being collected," "the intended use of the agency of the information," "with whom the information will be shared," "what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared," "how the information will be secured," and "whether a system of records is being created under" 5 U.S.C. § 552a (commonly referred to as the Privacy Act). E-Gov. Act § 208(b)(2)(B)(ii). After completion of the PIA, and before "initiating a new collection of information," the agency is directed to, "if practicable, . . . make the privacy impact assessment publicly available through the website of the agency, publication in the *Federal Register*, or other means." *Id.* § 208(b)(1)(B)(iii) (emphasis added).

The E-Government Act incorporates several provisions of the Paperwork Reduction Act, including the Act's definitions. E-Gov. Act § 201 ("Except as otherwise provided, in this title the definitions under sections 3502 and 3601 of title 44, United States Code, shall apply."). The Paperwork Reduction Act, in turn, requires Federal agencies seeking to collect information to first

publish a notice in the *Federal Register* and allow 60 days for submission of comments. 44 U.S.C. § 3506(c)(2)(A); *see also id.* § 3502(3) (defining "collection of information"). After considering the submitted comments, the agency must then submit its information collection request to the Director of the Office of Management and Budget ("OMB") for review. *See id.* § 3507(c)(3). The agency must also publish a second notice in the *Federal Register* to inform the public that the information collection request has been submitted to OMB and that additional comments may be directed to OMB. *Id.* § 3507(a)(1)(D). OMB must allow 30 days for public comment prior to approving or disapproving an information collection request. *Id.* § 3507(b), (e)(1). The E-Government Act does not require a similar notice-and-comment process.

II. FACTUAL BACKGROUND.

The Constitution requires that an "actual Enumeration" of the population be conducted every ten years in order to allocate representatives in Congress among the States, and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. The Census Act, 13 U.S.C. § 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine," and "authorize[s] [him] to obtain such other census information as necessary." *Id.* § 141(a). The Census Bureau assists the Secretary in performing this duty. *See id.* §§ 2, 4. The Act directs that the Secretary "shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." 13 U.S.C. § 5. Nothing in the Act directs the contents of the questions included on the decennial census.

On March 26, 2018, the Secretary of Commerce announced his decision to include a citizenship question on the 2020 Decennial Census questionnaire.[1] *See* Declaration of Robin J. Bachman, Chief Privacy Officer, United States Census Bureau ("Bachman Decl."), ¶ 10, ECF No. 12-2. At the time of the announcement, pursuant to Section 208 of the E-Government Act, the Census Bureau was in its annual process of reviewing its published Privacy Impact Assessment of a primary information technology system used to administer the decennial census – CEN08. *See* Bachman Decl. ¶¶ 3, 9, 10. CEN08 is owned by the Decennial Information Technology Division ("DITD") and is used to manage the development and implementation of a number of decennial census applications, including the Census Schedule A Human Resources Recruiting and Payroll Systems ("C-SHaRPS"), the Third-Party Fingerprinting System, and the Control and Response Data System ("CaRDS"). *Id.* ¶ 3. These applications contain several categories of information, including hiring and personnel data and data collected from decennial census respondents. *Id.* CEN08 shares information with several other of the Census Bureau's information technology systems, such as CEN21 (Human Resources Application), CEN05 (Field Systems Major Application System), CEN11 (Demographic Census, Surveys, and Special Processing), and CEN13 (Center for Economic Studies). *Id.* ¶ 14. CEN18 (Enterprise Applications) is the

[1] With the exception of 1840, decennial censuses from 1820 to 1880 asked for citizenship or birthplace information in some form, and decennial censuses from 1890 through 1950 specifically requested citizenship information. *See* U.S. Census Bureau, Measuring America: The Decennial Censuses From 1790 to 2000, at 6-13, https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf ("Measuring America"). Decennial censuses from 1960 to 2000 asked a portion of the population questions about the respondent's birthplace or citizenship. *Id.* at 72-73, 78, 91-92; U.S. Census Bureau, Questionnaires, https://www.census.gov/history/www/through_the_decades/questionnaires/. Beginning in 2005, the Census Bureau began collecting citizenship information through the American Community Survey ("ACS"), which is sent yearly to about one in 38 households. *See* U.S. Census Bureau, Archive of American Community Survey Questions, https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html (noting citizenship questions on every ACS questionnaire).

information technology system that facilitates the passing of information from CEN08 to these other information technology systems. *Id.* The Census Bureau updates its PIAs on a regular basis, and will continue to do so. *See id.* ¶¶ 9, 15. Current versions of the PIAs are published on Defendants' websites. *See, e.g.* U.S. Census Bureau, Privacy Impact Assessments (PIAs) and Privacy Threshold Analysis (PTAs), http://www.osec.doc.gov/opog/privacy/Census-pias.html?#.

During the annual privacy review of CEN08, the Census Bureau updated the CEN08 PIA to reflect the Census Bureau's intent to include citizenship status among the personally identifying information ("PII") to be collected during the 2020 Decennial Census and its then assessment of the confidentiality risk level of collecting PII. Bachman Decl. ¶ 10. The updated PIA was published on Commerce and the Census Bureau's websites on June 26, 2018. *Id.* ¶ 10 & Ex. A. The Census Bureau also updated the PIAs for CEN05, CEN11, CEN13, CEN18, and CEN21 during this time and likewise published the updated assessments on its website. *See id.* ¶¶ 9, 15.

The Census Bureau further updated the PIA for CEN08 in July 2018 to reflect employment recruiting and hiring activities for the 2020 Decennial Census. Bachman Decl. ¶ 13 & Ex. B. These updates focused on the collection of fingerprints and other personnel information during the application and hiring process for potential Census Bureau employees. *Id.* The updated PIA noted that the fingerprint and personnel information would be shared with other Federal agencies for the purposes of conducting background investigations and administering human resource programs, such as payroll. *Id.* The Census Bureau is currently in the process of updating the CEN08 PIA as it continues to refine its operations for the 2020 Decennial Census. *See id.* ¶¶ 6, 9. The PIAs for CEN05, CEN11, CEN13, and CEN18 are also currently under review to determine whether updates are warranted. *See id.* ¶ 15.

Decennial census respondent information collected through CEN08 and processed by or stored in other Census Bureau information technology systems, such as CEN05 and CEN11, is collected pursuant to the proscriptions of Title 13 of the United States Code, which requires that the Census Bureau maintain the confidentiality of the information it collects. Bachman Decl. ¶ 14. Indeed, Title 13 mandates that the Census Bureau only use the respondent information it collects for statistical purposes and expressly prohibits both the publication of personally identifying information and the use of collected information to a respondent's detriment. *Id.* ¶¶ 14, 16.

Plaintiff filed this lawsuit on November 20, 2018. It alleges that Defendants have violated the APA, 5 U.S.C. §§ 706(1), 706(2)(A), (C), by failing to conduct and publish Privacy Impact Assessments by March 26, 2018, that specifically address the collection of citizenship information for the information technology ("IT") systems that will be collecting, processing, and storing 2020 Decennial Census respondent information, as required by Section 208 the E-Government. *See* Compl. ¶¶ 47, 49, 53-62, 65, ECF No. 1. Plaintiff seeks an order "suspend[ing] and revok[ing]" Defendants' decision to collect citizenship data through the 2020 Census until such time as Defendants have "conducted, reviewed, and published the full and complete Privacy Impact Assessments required by [the privacy provisions] of [the] E-Government Act of 2002." Compl., Request for Relief ¶ B. Plaintiff also seeks an order (1) expressly removing the citizenship question from the 2020 Census, (2) enjoining Defendants from "any action in furtherance of Defendants' plan to collect citizenship data through the 2020 Census until" they have completed and published the Privacy Impact Assessments required by the privacy provisions of the E-Government Act of 2002, and (3) requiring Defendants to conduct, review, and publish the full and complete Privacy Impact Assessments. *Id.* ¶¶ C-E.

Nearly two months later, on January 18, 2019, Plaintiff moved for a preliminary injunction asserting it is entitled to such extraordinary relief because "the Census Bureau's failure to publish legally required privacy impact assessments causes [it] irreparable harm and conflicts with the public interest." Mem. in Supp of Pl.'s Mot. for a Prelim Inj, at 15, ECF No. 8-1 ("Pl.'s Prelim. Inj. Mem"). Plaintiff sought an order "preventing Defendants . . . from (1) implementing the [] March 26, 2018 decision to add a citizenship question to the 2020 Census, and (2) otherwise initiating any collection of citizenship status information that would be obtained through the 2020 Census" until final adjudication of the merits of its claims. Pl's. Mot. for a Prelim. Inj., at 1, ECF No. 8. On February 8, 2019, this Court denied Plaintiff's motion, concluding, *inter alia*, that "EPIC is . . . unlikely to succeed on the merits." Mem. Op.,2019 WL 498520, at *8.

STANDARD OF REVIEW

Motions brought pursuant to Federal Rule of Civil Procedure 12(b)(1) challenge a district court's jurisdiction over the action. *See* Fed. R. Civ. P. 12(b)(1). In reviewing a motion to dismiss under Rule 12(b)(1), a court is guided by the principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A party claiming subject matter jurisdiction bears the burden of demonstrating that such jurisdiction exists. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). Though a court must give the plaintiff the benefit of inferences that can be derived from the facts alleged in the complaint, *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004), "the Court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the Court accept plaintiffs' legal conclusions." *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006). When a defendant raises an issue of subject matter jurisdiction under Rule 12(b)(1), the Court must resolve the jurisdictional issue before it proceeds to the merits of the

plaintiff's claims. *See, e.g., Sinochem Int'l Co. v. Malay Int'l Shipping Corp*., 549 U.S. 422, 430-31 (2007).

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing a motion to dismiss under Rule 12(b)(6), the Court will ordinarily "accept as true all of the factual allegations contained in the complaint," *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (citation and quotations omitted), and construe it in the plaintiff's favor. *Porter v. CIA*, 778 F. Supp. 2d 60, 65 (D.D.C. 2011). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. PLAINTIFF LACKS STANDING.

Plaintiff seeks broad relief in this lawsuit. Plaintiff asks this Court to, *inter alia*, "[h]old unlawful and set aside the Defendants' decision to collect citizenship data through the 2020 Census, Defendants' placement of a citizenship question on the 2020 Census, and Defendants' initiation of the citizenship data collection process," Compl. Req. Relief ¶ A, to "suspend and revoke their decision [to] collect citizenship data," and to "revoke and remove the citizenship question from the 2020 Census" until Defendants have conducted another PIA specifically addressing the collection of citizenship data, *id.* ¶¶ B-C, to "cease and desist from any action in furtherance of Defendant's plan to collect citizenship data" until Defendants have conducted another PIA specifically addressing the collection of citizenship data, *id.* ¶ D, and then, perhaps

for completeness, to "conduct, review, and publish" a PIA for the collection of citizenship data, *id.* ¶ E. Plaintiff lacks Article III standing necessary to justify this relief.

The doctrine of standing, an essential aspect of the Article III case-or-controversy requirement, demands that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction[.]" *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted). At its "irreducible constitutional minimum," the standing doctrine requires a plaintiff, as the party invoking the Court's jurisdiction, to establish three elements: (1)a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Facts demonstrating each of these elements "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the [plaintiff's] pleadings." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citation omitted); *see also Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). "'[S]tanding is not dispensed in gross'[,] . . . [t]o the contrary, 'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

An organization can assert standing either on its own behalf (organizational standing) or on behalf of its members (associational, sometimes called representational, standing). *See Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). The D.C. Circuit has explicitly held that Plaintiff lacks organizational standing to seek relief under section 208 of the E-Government Act. *See EPIC v. PACEI II*, 878 F.3d at 378-379. Consequently, Plaintiff here tries to justify standing under a representational standing theory. As we discuss at greater length

below, Plaintiff cannot invoke representational standing because Plaintiff is not a membership organization. *See infra* at 15-17.

Even assuming, however, that Plaintiff was properly described as a membership organization, it has not established that any of its claimed "members"—that is, the individuals on its advisory board—would have "standing to sue in her or his own right." *Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005).

Plaintiff suggests that the addition of a citizenship question on the 2020 Decennial Census questionnaire "presents unique threats to privacy" and "personal security." Compl. ¶ 36. But any claim that the inclusion of a citizenship question jeopardizes the privacy interests of Plaintiff's advisory board would be "pure speculation," as the District Court for the Southern District of New York recently concluded in holding that privacy interests did not provide standing to challenge the inclusion of the citizenship question. *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 619 (S.D.N.Y. 2019).[2] As that court explained, any suggestion that individuals will be injured by the Census Bureau's potential misuse of data collected during the 2020 Decennial Census, *see, e.g.*, Compl. ¶ 40, is flatly at odds with the governing statute. Pursuant to Title 13 of the United States Code, "it would be illegal for the Department of Commerce to 'make any publication whereby the data furnished by any particular establishment or individual . . . can be identified." *New York*, 351 F. Supp. 3d at 618-619 (quoting 13 U.S.C. § 9(a)(2)). Accordingly, "the Census Bureau will apply 'disclosure avoidance techniques' to any data to ensure that information concerning particular respondents is not identifiable." *Id.* at 619. Moreover, the statute precludes

[2] The court found that the plaintiffs had standing on other grounds and held that the inclusion of the question was arbitrary and capricious. *See New York*, 351 F. Supp. 3d at 606, 647. The Supreme Court granted certiorari before judgment and will hear the case this term. *See* 2019 WL 331100 (U.S. Feb. 15, 2019).

Defendants from "us[ing]" census information "for any purpose other than the statistical purposes for which it is supplied," and even where the Secretary of Commerce provides other government agencies with aggregate statistical information, the information cannot "be used to the detriment of any respondent or other person to whom such information relates." 13 U.S.C. §§ 8(c), 9(a)(1).

Any speculation that Plaintiff may offer to the contrary, *cf., e.g.*, Compl. ¶ 40, is just that – speculation – and such speculative fears are "insufficient to create standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 (2013); *see also N.Y. v. U.S. Dep't of Commerce*, 351 F. Supp. 3d at 619 ("But it is pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents' data . . . ."). None of Plaintiff's allegations in this case cast doubt on the correctness of the New York court's ruling, which it issued after an eight-day bench trial. *See id.* at 516. Plaintiff, therefore, lacks standing to challenge the underlying agency action here (the addition of a citizenship question to the 2020 Decennial Census), and a theory of injury to privacy accordingly cannot be the basis for an injunction prohibiting Defendants from taking further steps to implement a citizenship question on the 2020 Decennial Census.

Unable to identify any cognizable threat to a privacy interest, Plaintiff alleges that its advisory board members and Board of Directors have an abstract informational interest in reviewing a PIA that specifically addresses the collection of citizenship data – a PIA Plaintiff contends Defendants were required to publish before March 26, 2018. But as this Court has already noted, a theory of informational injury likewise would not entitle Plaintiff to most of the relief it seeks – orders enjoining, suspending, revoking, removing, or ceasing the planning of the citizenship question until such time as Defendants have conducted a PIA that specifically addresses the collection of citizenship data. *See* Mem. Op., 2019 WL 498520, at *9. The Census Bureau has explained that it will conduct at least one more annual review of the relevant PIAs before

initiating a collection of information for the 2020 Decennial Census. *See* Bachman Decl. ¶¶ 9, 15. Whether it does so before or after it distributes census forms has no bearing whatsoever on Plaintiff's claimed informational interest, and—as this Court has already held—an order "'halting' the 'collecting of . . . data' cannot redress an informational injury under the E-Government Act.'" Mem. Op., 2019 WL 498520, at *9 (quoting *EPIC v. PACEI II*, 878 F.3d at 380).

Because the only question here is one of timing, the Court need not determine whether Plaintiff's claim of informational injury would provide standing if the Census Bureau had determined that it would not revise the relevant PIAs prior to initiating a collection of information for the 2020 Decennial Census. "To carry its burden of demonstrating a 'sufficiently concrete and particularized informational injury,' [] plaintiff must show that [at least one of its members] "'(1) [] has been deprived of information that, on [his or her] interpretation, a statute requires the government or a third party to disclose [], and (2) [] suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.'" *EPIC v. PACEI II*, 878 F.3d at 378 (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). An asserted informational injury to Plaintiff's "members" resulting from alleged delay in publishing an updated PIA is not the type of harm that Congress sought to avert when it enacted section 208. That provision, as the D.C. Circuit explained, "protect[s] *individuals . . . by requiring an agency to fully consider their privacy* before collecting their personal information." *Id.* (second emphasis added); *see also* E-Gov. Act § 208(a), (establishing that the purpose of section 208 "is to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government").

While other provisions of the E-Government Act make express that their purpose is to increase transparency, *see* E-Gov. Act §§ 204(a)(1), 207(a), section 208 does not create a

freestanding right to information. It instead protects individual privacy by requiring that agencies improve their internal decisionmaking by conducting and internally reviewing Privacy Impact Assessments. The requirement that an agency make the Privacy Impact Assessment public, "if practicable," "after completion of" that internal review does not create an informational right in members of the public whose privacy is not, as explained above, threatened. *See supra* at 11-12 (explaining that inclusion of the citizenship question inflicts no cognizable privacy harm on Plaintiff's purported "members"); *see also Lujan*, 504 U.S. at 572 & n.7 (explaining that a plaintiff has standing to "enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs" but that "persons who have no concrete interests affected" have no such procedural right).

Indeed, comparing the E-Government Act to other statutes that courts have found sufficient for informational standing illustrates the different purposes of disclosure between statutes that provide for informational standing and those, like the Act, that do not. The Federal Election Campaign Act, for example, was designed to disclose information about political contributors and nondisclosure was the type of injury that Act was designed to remedy. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998). Similarly, the Freedom of Information Act was designed to afford citizens an opportunity to "to be informed about 'what their government is up to,'" *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989), and an agency's failure to comply with the Act's disclosure requirements constitutes an injury sufficient to confer standing, *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449-50 (1989). And the Federal Advisory Committee Act was likewise designed to allow members of the public to scrutinize the activities of advisory committees, and, therefore, failure to comply with its informational disclosure provision could create a cognizable injury in fact. *See id*. Other statutes, such as section 10(c) of

the Endangered Species Act, have been held to create informational standing because they specifically "invite the submission from interested parties" after a notice has been published, so that the public may "meaningfully participate in the Act's permitting process." *Friends of Animals v. Jewell*, 824 F.3d 1033, 1041 (D.C. Cir. 2016). Here, by contrast, the E-Government Act has no post-publication public participation requirement nor is it primarily designed to foster public disclosure; instead, it is an internal decisionmaking statute that is of a different sort than that of the sort that normally supports an informational standing claim. *Cf.* Mem. Op., 2019 WL 498520, at *8 ("Congress's focus on ensuring 'protections' when agencies 'implement' electronic Government shows that § 208's provisions – including the requirement to prepare PIAs – were not meant to discourage agencies from collecting personal information but rather to ensure that they have sufficient protections in place before they do.").

Any alleged informational injury is particularly remote here, where the dispute is simply one of timing: Plaintiff certainly cannot show that, if its advisory board members and Board of Directors must wait some additional weeks or months to review an updated PIA specifically addressing the collection of citizenship data for the 2020 Decennial Census, they will "suffer[] . . . the type of harm Congress sought to prevent by requiring disclosure" in section 208—which is, again, a provision aimed at improving internal agency decisionmaking that on its face imposes no timing requirements whatsoever for publication. *EPIC v. PACEI II*, 878 F.3d at 378 (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)).

Finally, although the Court need not reach the issue, Plaintiff is not a membership organization or its functional equivalent and thus cannot proceed on a theory of representational standing. Plaintiff advanced its representational theory of standing in bringing a claim for relief pursuant to section 208 of the E-Government Act in *Electronic Privacy Information Center v.*

Presidential Advisory Commission on Election Integrity. The district court in that case determined that Plaintiff had failed to demonstrate it had representational standing to bring its claim because, *inter alia*, it was neither a membership organization nor the functional equivalent of a membership organization. *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity* ("*EPIC v. PACEI I*"), 266 F. Supp. 3d 297, 307-09 (D.D.C. 2017). Plaintiff subsequently abandoned any theory of representational standing on appeal in that case. *See EPIC v. PACEI II*, 878 F.3d at 381.

Before bringing this lawsuit, Plaintiff amended its Articles of Incorporation and Bylaws to refer to the individuals on its advisory board and Board of Directors as "members" and to require that they begin paying some unspecified amount of "dues." *See* Compl. ¶ 10; *see also* EPIC Bylaws §§ 2.02, 5.02-05, https://www.epic.org/epic/bylaws.pdf. But Plaintiff cannot circumvent its lack of organizational standing by simply renaming its board members and charging them a fee. Plaintiff continues to lack the indicia of a membership organization or its functional equivalent. *See Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002). Plaintiff does not "serve[] a specialized segment of the . . . community," represent individuals with "all of the indicia of membership in an organization," or have fortunes "closely tied to those of its constituency." *Id.* at 26. To the contrary, notwithstanding its recent decision to begin charging its board members a fee, Plaintiff continues to assert on its website that its primary objective is to serve the public at large by "focus[ing] public attention on emerging privacy and civil liberties issues and . . . protect[ing] privacy, freedom of expression, and democratic values in the information age." As a result, Plaintiff asserts that it "ha[s] no clients, no customers, and no shareholders." Elec. Privacy Info. Ctr., About, https://www.epic.org/epic/about.html (last visited Mar. 4, 2019). Unlike the "members" of a genuine membership organization, whose "fortunes . . . [are] closely tied to those

of [the organization]," *Fund Democracy*, 278 F.3d at 26, individuals on Plaintiff's advisory board and Board of Directors are no more affected by the organization's activities than other members of the public. *See, e.g.*, *Am. Legal Found. v. FCC*, 808 F.2d 84, 89-90 (D.C. Cir. 1987) ("With its broadly defined mission as a 'media watchdog,' ALF serves no discrete, stable group of persons with a definable set of common interests.").

In any event, as discussed above, even if the Court were to conclude Plaintiff has transformed itself into a membership organization that represents the interests of its advisory board and Board of Directors, none of those individuals have standing to sue on their own behalf, for the reasons discussed above – section 208 does not confer informational standing. *See Ass'n of Flight Attendants-CWA, AFL-CIO v. U.S. Dep't of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009) (observing that to establish representational standing, a plaintiff must show, among other things, that "its members would otherwise have standing to sue in their own right").

II. PLAINTIFF FAILS TO STATE A CLAIM.

Section 208(b) of the E-Government Act, requires an agency to complete, and, if practicable, publish, a Privacy Impact Assessment before "initiating a new collection of information." E-Gov. Act §§ 208(b)(1)(A)(ii), (b)(1)(B). Plaintiff argues that the Census Bureau was required to have published an assessment that specifically addresses the collection of citizenship data as of March 26, 2018, the date that the Secretary of Commerce "ordered the [reinstatement] of a citizenship question to the 2020 Census," because the Secretary's decision, it states, "initiat[ed] a new collection of citizenship status information."[3] Pl.'s Prelim. Inj. Mem. at

[3] The E-Government Act also requires an agency to complete a PIA before "developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form." E-Gov. Act § 208(b)(1)(A)(i). Plaintiff's complaint, however, only alleges violation of the E-Government Act's "initiating a new collection of information" requirement, *see*

19; Compl. ¶ 63. Plaintiff's claim utterly fails as a matter of statutory construction. The E-Government Act only requires that the Census Bureau complete and, if practicable, publish a PIA before initiating a new collection of information within the meaning of that Act – and because the Bureau has not yet started collecting citizenship information from the public for the 2020 Decennial Census, it has not violated the E-Government Act.[4] Accordingly, as this Court has already concluded, Plaintiff cannot state a claim.

One initial note about terminology. The E-Government Act refers to "Privacy Impact Assessments" to mean *both* the formal notice that must, if practicable, be published on the agency's website, in the *Federal Register*, or made publicly available by other means, *see* E-Gov. Act §§ 208 (b)(1)(B), (c), as well as the analysis that the agency conducts on an ongoing basis to ensure the continued adequacy of its IT systems. *See* Office of Management & Budget, Circular No. A-130, Appendix II-10 ("A PIA is an analysis of how PII is handled to ensure that handling conforms to applicable privacy requirements, determine the privacy risks associated with an information system or activity, and evaluate ways to mitigate the privacy risks. A PIA is both an analysis and a formal document detailing the process and the outcome of the analysis."), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/OMB/circulars/a130/a130revised.pdf; *see also* Bachman Decl. ¶ 4.

Compl. ¶¶ 14, 50, 65, 72; *see also* Pl.'s Prelim. Inj. Mem. at 19-21, and so only that requirement is at issue in this case.

[4] Furthermore, the Census Bureau had a published PIA in place at the time Plaintiff initiated this lawsuit which *did* reference the Bureau's intent to collect citizenship data. *See* U.S. Census Bureau, Privacy Impact Assessment for the CEN08 Decennial Information Technology Divisions (DITD) (Sept. 27, 2018), http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN08_PIA_SAOP_Approved.pdf.

This case is only about the timing of formal written notification about the outcome of the PIA process, as Plaintiff itself makes clear. *See* Compl. ¶¶ 50-51, 69, 75; *see also* Pl.'s Prelim. Inj Mem. at 38 (claiming that its members have "sought and were denied information which the Government is required to disclose under section 208 of the E-Government Act," and basing its sole claim to informational standing on that purported non-disclosure). The agency must satisfy that obligation, in turn, before "initiating a new collection of information." E-Gov. Act §§ 208(b)(1)(A)(ii), (b)(1)(B). Accordingly, unless otherwise stated, this brief's references to a "Privacy Impact Assessment" or a "PIA" refer to the formal document that must, if practicable, be published or otherwise made publicly available before the agency may collect information.

1. The Census Bureau Has Not "Initiated a New Collection of Information."

"As in any statutory construction case, '[the court] start[s], of course, with the statutory text,' and proceed[s] from that understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). Here, the statutory trigger for the E-Government Act is whether an agency is "initiating a new collection of information." E-Gov. Act § 208(b)(1)(A)(ii). If it is, the agency must first have conducted and, if practicable, made public a PIA. If it is not, the agency's obligations under the Act will not have yet ripened. Here, as Plaintiff previously acknowledged, the Census Bureau has not yet asked the public to respond to the 2020 Decennial Census questionnaire and, thus, has not "initiat[ed] a new collection of information." The E-Government Act does not define the term "initiating," although, as Plaintiff recognized, the common definition of "initiate" means "[c]ommence" or "start." Pl.'s Prelim. Inj. Mem. at 19 (quoting *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 1, 9 (D.D.C. 1998)); *see also* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/initiate ("to

cause or facilitate the beginning of: set going"); Mem. Op., 2019 WL 498520, at *4 (additional definitions). "Initiating," therefore, means something akin to "starting." *See* Mem. Op., 2019 WL 498529, at *4 ("These definitions share a focus on the *beginning, starting,* or *commencing* of a course of conduct.").

The term "collection of information," E-Gov. Act § 208(b)(1)(A)(ii) however, is specifically defined in the statute. The E-Government Act provides that "in this title the definition under sections 3502 and 3601 of title 44, United States Code, shall apply." E-Gov. Act § 201. Section 3502 of Title 44, in turn, defines "collection of information" to "mean[] the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form of format, calling for [certain quantities or types of information]." 44 U.S.C. § 3502(3)(A). Putting these two definitions together, then, an agency must have conducted and, if practicable, published a PIA before (1) starting (2) the obtaining or soliciting of information from the public – or, said differently, before it actually starts to ask the public to submit Census information. That has not occurred yet – nor does Plaintiff state that it has in its papers – and therefore the Census Bureau has not "initiat[ed] a new collection of information." *See also* Mem. Op., 2019 WL 498520, at *4 ("While Secretary Ross decided to collect citizenship information . . . the defendants have yet to actually begin obtaining, soliciting, or requiring the disclosure of any citizenship data.").

This is the best reading of the statute. Notably, the use of the present tense gerunds in the definition of "collection of information" (*e.g.*, "obtaining" or "causing to be obtained"), indicates that the collection is a present-tense activity, in other words, that the collection of information occurs when the agency actually is soliciting information from the public, not merely when it is planning to collect that information in the future. And because the verb "initiating" modifies the

present tense gerunds that make up "collection of information," the statute on its face contemplates that the agency must complete its analysis and, if practicable, publish the PIA before it starts to obtain information from the public – or before it starts to mail or distribute census forms to individuals.

This reading accords with how the phrase "initiating" is used in other legal contexts. As this Court has observed, "[c]ourts routinely use the phrase 'initiating an action' to refer to the filing of the complaint. And it would be unusual – if not downright misleading – to claim to have 'initiated' a lawsuit when in fact one had merely decided which claims to allege in the complaint." Mem. Op., 2019 WL 498520, at *5 (citations omitted). Moreover, had Congress intended to require a PIA before "planning" or "providing for" a new collection of information, it could have done so. *See id.* The fact that it chose not to "strongly supports rejecting" such an interpretation here. *Id.* (quoting *Knight v. Comm'r*, 552 U.S. 181, 188 (2008)).

This reading is also consistent with how courts and other agencies have interpreted Section 208 – as a requirement to complete and, if practicable, publish a PIA before starting to solicit information from the public. The D.C. Circuit has stated as much. *See EPIC v. PACEI II*, 878 F.3d at 378 ("As we read it, the provision [Section 208] is intended to protect *individuals* . . . by requiring an agency to fully consider their privacy *before collecting their personal information*.") (second emphasis added). Additionally, the Office of Management and Budget ("OMB"), which administers the Paperwork Reduction Act from which the E-Government Act borrows its definition section, similarly defines "[c]ollection of information" to mean "the obtaining, causing to be obtained, soliciting, or requiring the disclosure . . . of information." 5 C.F.R. § 1320.3(c). Applying a common-sense reading to this definition, the Census Bureau must complete and, if practicable, publish a PIA before it begins obtaining, soliciting, or requiring the disclosure of

information from a third party; in other words, before it sends out a document requesting a Census response from a member of the public.

Plaintiff argued in support of its motion for a preliminary injunction and in its complaint that the Census Bureau began "initiating a new collection of information" when the Secretary of Commerce made the decision to include a citizenship question on the 2020 Decennial Census questionnaire on March 26, 2018. Pl.'s Prelim. Inj. Mem. at 20; *see also* Compl. ¶¶ 50-51, 63. But there is no basis in the E-Government Act's text for such a construction. The Census Bureau has not asked any member of the public to submit that information; indeed, as Plaintiff has previously acknowledged, the Census Bureau has not even begun printing, addressing, or mailing census forms, and will not begin the first of these steps (printing) until June 2019. *See* U.S. Census Bureau, 2020 Census Operational Plan: A New Design for the 21st Century 97 (Dec. 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf; Pl.'s Prelim. Inj. Mem. at 31. And, of course, the Census Bureau will not actually solicit responses to any questions until later. Plaintiff's argument, therefore, is the same as saying that a person has "commenced the soliciting" of a wedding RSVP as soon as a couple decides what information to include in the wedding invitation, but before the invitation is even printed, much less sent. That reading belies common sense – a person "commences the solicitation" of the wedding RSVP when they send the invitation. So too here: the Bureau "commences the solicitation" of the response to the decennial census when it mails the form or asks the question, not when the Secretary decided what questions should be included in the questionnaire. *See also* Mem. Op., 2019 WL 498520, at *4 ("To build on the wedding analogy, a couple does not 'initiate' their marriage by getting engaged or choosing a wedding date, even if those actions ordinarily serve as a final – and binding – decision to tie the knot. As each subsequent

anniversary celebration makes clear, they will not have 'initiated' their marriage until the wedding day.")

Next, Plaintiff noted in its memorandum supporting its motion for a preliminary injunction that "[a]n agency need not actually acquire 'facts or opinions' for the collection of information to exist, so long as the process of 'obtaining,' 'soliciting,' or 'requiring. . . disclosure' is underway." Pl.'s Prelim. Inj. Mem. at 20 (quoting 44 U.S.C. § 3502(3)(A)). This is true, but irrelevant. Defendants acknowledge that an agency has "initiat[ed] the collection of information" once it makes the request of a member of the public, even if it has yet to receive an answer (in this context, when the Census Bureau mails the questionnaire but before it receives a response). But because the Census Bureau has yet to ask the question, or, in the words of the statute, to start soliciting or obtaining a response, this fact is of no legal significance. *See* Mem. Op., 2019 WL 498520, at *6 ("Consequently, 'initiating' a 'collection of information' – even if viewed as a process – still requires the beginning of at least one of these actions [obtaining, causing information to be obtained, soliciting information, or requiring the disclosure of information].").

Plaintiff also contended in its preliminary injunction papers that the obligation to complete and publish a PIA that specifically addresses the collection of citizenship data matured as of March 26, 2018 – the date "the Bureau introduced a new requirement that census respondents disclose 'facts or opinions' to 'third parties or the public.'" Pl.'s Prelim. Inj. Mem. at 21; *see also* 44 U.S.C. § 3502(3) (defining "collection of information" to include "requiring the disclosure" of information). But the Secretary's memorandum announcing his decision to collect citizenship information during the 2020 Decennial Census did not require *third parties* to disclose information, it simply directed the Census Bureau to include a citizenship question on the 2020 Decennial Census questionnaire. *See* Mem. Op., 2019 WL 498520, at *4. Only once the

citizenship question is asked of a respondent via a Paperwork Reduction Act-approved decennial census questionnaire or form does the requirement to disclose information ripen.[5] *See* 13 U.S.C. § 221(a) (individuals are required to respond to "any of the questions on any schedule submitted to him in connection with any census or survey"); *see also* 44 U.S.C. § 3512(a) ("no person shall be subject to any penalty for failing to comply with a collection of information" absent that collection's approval pursuant to the Paperwork Reduction Act). *See* Mem. Op., 2019 WL 498520, at *6 (holding that Plaintiff's argument that the Secretary had "literally 'requir[ed] the disclosure of facts or opinions to third parties'" in March 2018 as "simply not true").

Plaintiff further stated in support of its motion for a preliminary injunction that the Census Bureau has "introduced a definite 'plan . . . calling for the collection or disclosure of information.'" Pl.'s Prelim. Inj. Mem. at 21 (quoting 5 C.F.R. § 1320.3(c)). This argument refers to a sub-component of OMB's Paperwork Reduction Act regulations. Those OMB regulations note that "[a]s used in this Part," referring to Paperwork Reduction Act obligations not at issue here, "'collection of information,' refers to the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate." 5 C.F.R. § 1320.3(c). (This qualification appears to refer to the fact that the Paperwork Reduction Act's regulations sometimes use "collection of information" as a verb, and sometimes as a noun to describe a package of information that must be submitted to OMB for approval, *e.g.*, 5 C.F.R. § 1320.10.) Even this

[5] As noted above, the Paperwork Reduction Act requires federal agencies seeking to collect information to first publish a notice in the *Federal Register* and allow 60 days for submission of comments. 44 U.S.C. § 3506(c)(2)(A); *see also id.* § 3502(3) (defining "collection of information"). After considering the submitted comments, the agency must then submit its information collection request to the Director of the Office of Management and Budget for review and approval. *See id.* § 3507(c)(3).

definition – which does not explicitly apply outside Paperwork Reduction Act regulations – is consistent with the government's interpretation. The only new element that the definition provides to "collection of information" is that the term can be, in certain contexts, a "plan and/or an instrument calling for the collection or disclosure of information." 5 C.F.R. § 1320.3(c); *see also* Mem. Op., 2019 WL 498520, at *7 (noting the Court's skepticism about importing the Paperwork Reduction Act's regulatory definitions to the E-Government Act context).

But even if this definition did apply in this context, "[i]nitiating an instrument calling for the disclosure of information" is just another way of saying that the Bureau has posed the citizenship question to a member of the public via a questionnaire and solicited a response. Similarly, "initiating a plan calling for the disclosure of information" is best read to refer to the Census Bureau having started to solicit information from members of the public via the implementation of its process for soliciting such responses (*i.e.*, starting the process of asking for and collecting census responses, or begun executing that solicitation plan), if, indeed, it makes sense at all in this context. As this Court explained, "even if the OMB regulations did apply, they would not change the outcome here": "[t]o 'initiate' a 'plan' would still mean to commence it or put it into action, not merely to announce it." Mem. Op., 2019 WL 498520, at *7.

Plaintiff attempts to contort the OMB regulations to state that an agency initiates a collection of information, and therefore must publish, if practicable, a PIA, once the agency has started *planning* to collect information. But the OMB regulations mention a "plan," not "planning." *See* 5 C.F.R. § 1320.3. Nor would it make sense to say that the agency must complete and, if practicable, publish a PIA *before* it has "started planning" the information collection. Before publication of a PIA, among other things, Section 208 of the E-Government Act requires that the agency have already identified what information is to be collected, as well as why, and

how it will be used, and the IT security measures that will be in place to protect such data. *See* E-Gov. Act § 208(b)(2)(B). But this is information that can only be known – and therefore published – *during* or even at the conclusion of the planning process, not before the planning has begun. Plaintiff's construction is thus incompatible with the structure of the statute itself.

2. Plaintiff is Not Likely to Show That its Claims Are Ripe or That it States a Claim Under the APA.

When it denied Plaintiff's motion for a preliminary injunction, this Court declined to rely on concepts of ripeness and finality, stating that "these arguments would only be relevant if EPIC sought to challenge, prospectively, the agencies' failure to conduct or release adequate PIAs in the future." Mem. Op., 2019 WL 498520, at *8 n.10. The Court need not reconsider those conclusions here; the Court can dismiss the case for lack of standing or, if the Court finds it has jurisdiction, for failure to state a claim. But Defendants preserve their argument that, because the Census Bureau has not yet "initiat[ed] a new collection of information," E-Gov. Act § 208(b)(1)(A)(ii), Plaintiff's claims do not satisfy the elements of prudential ripeness. As Defendants explained in opposing Plaintiff's motion for a preliminary injunction, "[t]he ripeness doctrine generally deals with when a federal court can or should decide a case." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012). "The doctrine's purpose is 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 37 (D.D.C. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Ripeness has both constitutional and prudential elements, and in general, prudential ripeness requires that the parties "permit[] the administrative process to reach its end," since that "can at least solidify or simplify the factual context and narrow the legal issues

at play." *Am. Petroleum Inst.*, 683 F.3d at 387; *see also id.* ("Put simply, the doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once.").

Prudential ripeness has two elements – the fitness of the issue for judicial review and the extent to which withholding a decision will cause hardship to the parties. *See Abbott Labs.*, 387 U.S. at 149. "The fitness requirement is primarily meant to protect 'the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.'" *Am. Petroleum Inst.*, 683 F.3d at 387 (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999)). In general, a matter is not fit for judicial review if the "Court could not know what shape the final [determination] would take." *Belmont Abbey Coll.*, 878 F. Supp. 2d at 39.

Here, as discussed above, the Census Bureau is not yet required to publish, if practicable, a final PIA, and the context of the eventual final PIA - which the Census Bureau must complete before initiating the collection of information - remains inchoate. Until that threshold is passed, this dispute is not fit for review. Nor does "Plaintiff face[] any hardship that would outweigh the Court's interest in deferring review." *Id.* at 41. For this inquiry, courts "consider 'not whether the [parties] have suffered any 'direct hardship,' but whether *postponing* judicial review would impose an undue burden on them or would benefit the court.'" *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1120 (D.C. Cir. 2004). Plaintiff has not shown that allowing the Census Bureau to issue a PIA under the timeframe permitted by the E-Government Act would impose an undue burden on its members.

Nor has Plaintiff stated a claim under the APA. It first states that it is "aggrieved by the Census Bureau's unlawful initiation of a new collection of information without first completing

the required privacy impact assessments." Pl.'s Prelim. Inj. Mem. at 24 (citing Compl. ¶¶ 64-70). Defendants assume this is an allegation that the Census Bureau has taken action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). But this claim is not likely to succeed for two reasons. First, as discussed above, the Census Bureau has not acted arbitrarily, capriciously, or contrary to law; rather, it has adhered to the timing requirements set out by the E-Government Act.

Second, and relatedly, the Census Bureau's non-issuance of a final PIA with regard to the citizenship question does not constitute final agency action. Defendants again acknowledge that the Court declined to rely on principles of finality in denying Plaintiff's motion for a preliminary injunction, *see* Mem. Op., 2019 WL 498520, at *8 n.10, but Defendants briefly restate the argument here. Only "final agency action," as opposed to action that is "preliminary, procedural, or intermediate," is reviewable under the APA. 5 U.S.C. § 704; *see also Trudeau v. FTC*, 456 F.3d 178, 184-85 (D.C. Cir. 2006) (final agency action is a necessary requirement for a plaintiff to state a cause of action under the APA). Whether agency action is "final," in turn, is governed by the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). "First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-78 (internal citations omitted).

As Plaintiff noted in its memorandum in support of its preliminary injunction motion, the Secretary's March 26, 2018, decision to direct the Census Bureau to include a citizenship question on the 2020 Decennial Census questionnaire constitutes final agency action by the Commerce Department. *See* Pl.'s Prelim. Inj. Mem. at 24-25. But that decision is not challenged in this case.

The decision at issue here is whether the Census Bureau has taken final agency action *with respect to publishing a PIA for the 2020 Decennial Census questionnaire including a citizenship question*. And here, as the Census Bureau has noted, the CEN08 PIA, as with its other PIAs, will continue to be reviewed and updated as the agency's 2020 Decennial Census operations become more refined.[6] *See* Bachman Decl. ¶¶ 6, 9, 15 (discussing future PIA updates). This process is not, therefore, final.

Plaintiff also alleges a violation of section 706(1) of the APA to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 64 (2004). This provision is similar to a mandamus remedy, and requires "a specific, unequivocal command." *Id.* at 63. Here, however, Section 208(b) does not *unequivocally* require the Census Bureau to publish *any* PIA regarding the 2020 Decennial Census questionnaire at this time – at best, as discussed above, the language is ambiguous. Nor does Section 208(b) *unequivocally* require the Census

[6] Nor can Plaintiff argue that Defendants have "fail[ed] to act" within the meaning of 5 U.S.C. § 551(13). A "failure to act" claim must still satisfy the final agency action requirement, and in the context of section 706(2), the D.C. Circuit has emphasized that the agency must have finalized a decision *not* to issue a final decision, *i.e.*, to have decided never to issue a PIA with regard to the decennial census questionnaire. The fact that the agency has simply not yet taken action is not reviewable. *See, e.g.*, *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (concluding that "EPA's failure as yet to issue a final rule" does not "reflect[] an acknowledged EPA decision to [not regulate certain strip mines]."), *partially abrogated by statute on other grounds, as reported by Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) ("[A]lthough . . . the EPA concededly made no final decision on petitioners' request that the section 115 remedial process be initiated, it *clearly and unequivocally* rejected . . . petitioners' requests for a separate proceeding[.]") (emphasis added); *see also Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1396 (D.C. Cir. 1991) (agency statements that "do not constitute a definitive position . . . such that they represent a final statement of the agency's position" do not constitute final agency action).

Bureau to publish any PIA regarding the 2020 Decennial Census questionnaire at all. Section 208(b) provides agencies with discretion in making PIAs publicly available by noting that publication is required only "if practicable." E-Gov. Act § 208(b)(1)(B)(iii).

Finally, Plaintiff cannot attempt to challenge the PIA-process itself, *i.e.*, the process by which Defendants continually reexamine their IT systems. *See* OMB Circulator A-130, *supra*. Even if Plaintiff claimed standing for such a claim, and it does not, *see* Compl. ¶¶ 68-69, 74-75; Pl.'s Prelim. Inj. Mem. at 37-40, such a legal claim would be the "kind of broad programmatic attack" that the Supreme Court has repeatedly rejected. *See SUWA*, 542 U.S. at 64 (citing *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871 (1990)). Accordingly, Plaintiff's section 706(1) claim is meritless.

CONCLUSION

For the aforementioned reasons and consistent with the Court's Memorandum Opinion denying Plaintiff's Motion for a Preliminary Injunction, the Court should dismiss Plaintiff's complaint in its entirety.

Dated: March 11, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

CARLOTTA P. WELLS
Assistant Branch Director

/s/ Kristina A. Wolfe
KRISTINA A. WOLFE
JOSEPH E. BORSON (Va. Bar No. 85519)
Trial Attorney, U. S. Dept. of Justice
Civil Division, Federal Programs Branch
1100 L St., NW
Washington, D.C. 20005
Tel. (202) 353-4519
Email: kristina.wolfe@usdoj.gov